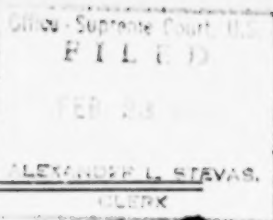


No. 83-305



In The
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

- (1) Does a duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath testing machine which automatically expels and thus destroys the breath sample during the test process?
- (2) Does a duty to preserve evidence under federal due process compel law enforcement to gather evidence for use of the defendant?

PARTIES TO PROCEEDING

The California Court of Appeal consolidated four separate cases in this proceeding, all of which involved drunk-driving prosecutions. In addition to respondent Trombetta (No. A016358), the decision affects Michael Gene Cox (No. A016374), Gregory Moller Ward (No. A017265), and Gale Bernell Berry (No. A017266). The Cox case (No. A016374) was itself a consolidated case which involved, in addition to Cox, Thomas Nelson Muldoon, Clinton James Brown, Densel Lee Furner, Patricia Jane Keeffe, Herbert John Berreyessa, and James K. Schneider.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion filed by the Court of Appeal on March 28, 1983, is reported at 141 Cal. App. 3d 400. This opinion was substantially modified on April 27, 1983, and the opinion as modified was ordered republished in its entirety, appearing at 142 Cal. App. 3d 138, 190 Cal. Rptr. 319. Both opinions are contained in the Appendix (J.A., pp. 137, 150).

JURISDICTION

On March 28, 1983, the California Court of Appeal for the First Appellate District filed its opinion dismissing appeals taken by two groups of defendants¹ and granting writs of habeas corpus as to two other groups. The opinion also established a rule binding upon future breath alcohol testing by agencies enforcing California's drunk driving laws. On April 27, 1983, a petition for rehearing was denied, and a substantially modified version of the original opinion was filed. On June 23, 1983, the California Supreme Court denied the People's petition for a hearing.

On July 1, 1983, the Court of Appeal issued an order staying issuance of the remittitur through August 30, 1983, to permit the People to file a petition for certiorari in this Court. The stay was extended indefinitely by an order filed on August 31, 1983.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).



CONSTITUTIONAL PROVISION INVOLVED

The case involves interpretation of the due process clause of section 1 of the Fourteenth Amendment to the Constitution, which provides, insofar as pertinent, that:

1. Although these appeals were dismissed on technical grounds, the decision is specifically applicable to the defendants who brought the appeals, none of whom have yet been tried on the drunk driving charges. As to these persons, the decision amounts to an order suppressing evidence. (See 142 Cal.App.3d, at 140, 144, 190 Cal.Rptr., at 320, 323; J.A., pp. 153, 160.)

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law"

— o —

STATEMENT OF THE CASE

Procedural Background

All of these cases involve efforts by defendants charged with violation of California's drunk driving laws to suppress the results of breath alcohol tests obtained on an Intoxilyzer machine. Each respondent was arrested and charged with driving while under the influence of alcohol; respondent Ward being charged with two separate offenses.² Before trial, each filed a motion seeking suppression of breath-test results on the ground that the breath sample had not been preserved. All of these motions were denied.

Ward and Berry submitted their cases on the police reports and were convicted. Execution or imposition of sentence was stayed for each pending appeal to the Appellate Department of the Contra Costa County Superior Court, which affirmed their convictions but certified their consolidated cases to the California Court of Appeal.³ When a division of the Court of Appeal declined transfer, each filed a petition for a writ of habeas corpus in the

2. Former California Vehicle Code, § 23102; now § 23152(a).

3. "The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law." Cal. R. Ct. 63(a). The Court of Appeal may decline the transfer, however. Cal. R. Ct. 62.

California Supreme Court. That court issued an order to show cause returnable before a different division of the Court of Appeal.

Neither Trombetta nor Cox have yet been tried. The Trombetta motion was denied after an evidentiary hearing, and an appeal was taken to the Appellate Department of the Sonoma County Superior Court. It was stipulated that the hearing in *Trombetta* could be considered in Cox's similar appeal. The denial of their motions was affirmed, but the Appellate Department certified the cases to the Court of Appeal, a division of which accepted transfer. All four cases were thus in the same division and were consolidated.

The Court of Appeal filed its first opinion on March 28, 1983 (*Trombetta I*). A petition for rehearing was denied on April 27, 1983, but in denying the petition the prior opinion was substantially modified (*Trombetta II*).⁴ The California Supreme Court denied a petition for hearing on June 23, 1983.

4. When confronted with the prior authority of *People v. Miller* (1975) 52 Cal. App. 3d 666, 125 Cal. Rptr. 341, in *Trombetta I* the Court of Appeal "distinguished" it on the basis that since that decision "new technology"—specifically the indium tube—had been developed which now permitted breath-sample preservation. *Trombetta I*, 141 Cal. App. 3d at pp. 405-406. Although realizing that silica gel tube retention devices were not approved in California, the court also referred to their use in Colorado and opined that if approved by the California Department of Health, these too might be acceptable. *Id.*, at p. 406. On petition for rehearing, the State pointed out that a silica gel device had been tested in 1971 and again in 1974 and failed all Department of Health tests, while the "new" indium tube had been approved since 1974, more than a year before *Miller* was decided. (Pet. for Reh., pp. 8-9.) In *Trombetta II*, all references to "new technology" were stricken, and the Court of Appeal flatly disagreed with *Miller's* interpretation of what constitutes "possession." *Trombetta II*, 142 Cal. App. 3d 138, 143-144, 190 Cal. Rptr. 319, 322.

Although the Court of Appeal held that an appeal to the Appellate Department of the Superior Court was not available before trial, it nevertheless applied its decision to Trombetta and Cox who have yet to be tried. *Trombetta II*, 142 Cal. App. 3d at 140, 144, 190 Cal. Rptr. at 320, 323. The decision therefore acts as an order suppressing evidence in these two groups of cases.

In the *Ward* and *Berry* cases, the defendants had already been convicted of drunken driving and brought writs of habeas corpus in the Court of Appeal challenging their convictions. The decision orders new trials for these defendants at which trials evidence of the breath-test results will be excluded. *Trombetta II*, 142 Cal. App. 3d at 145, 190 Cal. Rptr. at 323.

Facts

Respondent Berry was arrested for drunk driving on January 16, 1980, near Orinda, California, and given two breath tests on an Intoxilyzer, resulting in two readings of his blood-alcohol concentration (BAC) at a level of .20.⁵ Ward was first arrested for drunk driving on July 6, 1980, near Orinda and given two breath tests on an Intoxilyzer, resulting in BAC readings of .18 and .17. On September 20, 1980, Ward was again arrested for drunk driving in the neighboring town of Moraga and tested on the Intoxilyzer, resulting in BAC readings of .26 and .25. Cox was arrested for drunk driving on December 12,

5. California law requires two breath tests which must agree by +/− .02. 17 Cal. Adm. Code § 1221.4(a) (1); see *People v. French* (1978) 77 Cal. App. 3d 511, 520-521, 143 Cal. Rptr. 782, 786-787.) A level of .10 establishes intoxication. Cal. Veh. Code, § 23155(a) (3); formerly § 23126(a) (3). This level is generally accepted as that level at which all drivers are impaired. See Final Report, Presidential Commission on Drunk Driving (Nov. 1983) p. 17. Actually impairment occurs at a level of .08. *Id.*

1980, in Santa Rosa and tested on the Intoxilyzer, resulting in two BAC readings of .20. Trombetta was arrested for drunk driving on January 31, 1981, in Santa Rosa and tested on the Intoxilyzer, resulting in BAC readings of .19 and .18.

Under California law, a drunk driving suspect is given his choice of submitting to a test of his blood, breath, or urine. Cal. Veh. Code, § 13353(a). The Intoxilyzer is an instrument approved by the California Department of Health for evidential breath testing.⁶ The legal issues turn upon the operation of the instrument itself.

The following explanation of Intoxilyzer operation is found in *People v. Miller* (1975) 52 Cal. App. 3d 666, 668-669, 125 Cal. Rptr. 341, 342:⁷

6. Law enforcement agencies must test breath samples in conformity with Department of Health regulations. Cal. Health & Saf. Code, § 436.51. Breath alcohol analysis may be performed only upon instruments which pass that Department's evaluation tests. 17 Cal. Admin. Code, §§ 1221.1(a), 1221.2, 1221.3(c), 1221.3(d), 1221.3(i).

The Intoxilyzer was first evaluated and approved in California in 1974. See Summary of Activities Relating to Evaluation of Instruments and Related Accessories for Breath Alcohol Analysis, California Department of Health (Report No. 2, Feb. 1974) Table 10, p. 5. "The intoxilyzer has been subjected to rigid scrutiny and testing by a state agency qualified in this technical field. It has been approved for use under the detailed regulations prescribed by that agency." *People v. Miller* (1975) 52 Cal. App. 3d 666, 670, 125 Cal. Rptr. 341, 343. It is still approved and is the instrument of choice by most California law enforcement agencies, constituting 82% of the instruments utilized.

7. *Miller* provides what is the clearest and most succinct of all Intoxilyzer explanations. In the present case, the Court of Appeal did not quarrel with that explanation, and in fact cited it 142 Cal. App. 3d at 141-142, 190 Cal. Rptr. at 321. *Miller*, however, found Intoxilyzer use constitutional and rejected the very argument successfully made here 52 Cal. App. 3d at 669-670, 125 Cal. Rptr. at 342-343. It was this portion of *Miller* with which the Court of Appeal "fundamentally disagreed." 142 Cal. App. 3d at 143-144, 190 Cal. Rptr. at 322.

"The subject's breath is captured in a metal chamber, infrared energy of fixed intensity and wave length is passed through the chamber from one side to a photo-electric cell on the other side. Alcohol absorbs light of the fixed wave length. The device computes the loss of energy, translates the result in terms of the grams of alcohol per 100 milliliters of blood, and prints the result upon a card. In the prescribed operation of the device, clean air is first tested, then the breath of the subject. The chamber is then purged by blowing clear air through it, the clear air is tested, and all three results appear upon the printed card. The two tests of clear air constitute a test of the machine, and should show zero alcohol content. It is apparent that no test result, save the printout card, was available for preservation."

The following facts concerning the operation of the Intoxilyzer were found by the Municipal Court judge in the *Trometta* case:⁸

"It appears to this court that from the testimony elicited and from the evidence submitted, that at best a state when using the 4011-W Intoxilyzer unit, *temporarily* collects or gathers breath of a tested individual. The chamber which collects this breath contains it only for a period of time necessary to conduct an analysis of this breath. By the construction of the machine itself, namely that of having two or [i]ffices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the

8. The only factual findings at the trial level were made in the *Trombetta* case. A copy of Judge Antolini's findings are included in the Appendix (at p. 40). The Cox group of cases came from the same county as *Trombetta* and were governed by that finding. No factual findings were made in *Ward* or *Berry* since the trial court considered itself bound by the decision in *People v. Miller* (1975) 52 Cal. App. 3d 666, 125 Cal. Rptr. 341, which has already been quoted.

ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilyzer unit. The argument that the state is in control of the breath and that by choosing to purge that sample, destroys it, is an argument that in the court's opinion is *reductio ad absurdum*. Mr. Murray, the defense witness, stated in substance, that the intoxilyzer collects breath but not for later analysis and then must be purged in order to be useable again. Without an addition to the present intoxilyzer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporarily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself."

SUMMARY OF ARGUMENT

The Constitution requires neither preservation of nor prosecution with physical evidence. By so interpreting *Brady v. Maryland* (1963) 373 U.S. 83, the California courts have expanded that decision far beyond any reasonable bounds. *Brady* focuses upon the duty to disclose evidence exonerating the accused, not upon a general duty of evidence preservation. Indeed in *United States v. Augenblick* (1969) 393 U.S. 348, 356, this Court held that the loss or destruction of evidence was not a federal constitutional question with overtones of due process. What a defendant is entitled to under due process is a fair trial, and this may be had even though physical evidence has been lost or destroyed.

Whatever preservation requirement may exist under the federal Constitution, it certainly does not arise when

the State does not have evidence in its possession in any useful form. Nor is there any requirement under due process of law that the State should make affirmative efforts to collect evidence for the benefit of the accused.

A violation of *Brady* occurs only if it can be shown that evidence favorable to the defense and material to the case was suppressed. *Moore v. Illinois* (1972) 408 U.S. 783, 794-795. None of the three elements necessary to that showing are demonstrated here. Destruction by the ordinary operation of a testing device is not suppression; this evidence was unfavorable to defendants; and the evidence was not "material" in its due process sense since numerous and adequate avenues remained open to these defendants through which they could test and even challenge the evidence, although it no longer physically existed. Nor was the breath sample destroyed material evidence as a practical matter.

ARGUMENT

I.

The Constitution Requires Neither Preservation Of Nor Prosecution With Physical Evidence.

The opinion below is predicated upon the proposition that the federal Constitution requires the collection and preservation of physical evidence if there is a reasonable possibility that it might be of benefit to the accused. 142 Cal. App. 3d at 143, 190 Cal. Rptr. at 322. This interpretation of the Constitution has its California genesis in *People*

v. *Hitch* (1974) 12 Cal. 3d 641, 527 P.2d 361.⁹ In *Hitch*, 12 Cal. 3d at 645-648, 650-653, 527 P.2d at 364-367, 369, the California Supreme Court devined this rule by reference to *Giglio v. United States* (1971) 405 U.S. 150, 153-154, and *Brady v. Maryland* (1963) 373 U.S. 83, 87, as well as *United States v. Bryant* (D.C. Cir. 1971) 439 F.2d 642, 647-648, which also purports to apply *Brady* in achieving a similar end. Yet *Hitch* and *Bryant* create a quantum leap in the Constitution through transmogrification of *Brady*.

Brady v. Maryland, *supra*, was a murder case in which the prosecutor withheld from the defense a confession in which codefendant Boblit, who was separately tried, had admitted that it was he who had killed the victim. 373 U.S., at 84. This Court viewed nondisclosure of such clearly-exculpatory information as unfair and incompatible with our system of justice. *Id.*, at 87-88. In *Giglio v. United States*, *supra*, 405 U.S., at 154-155, the witness who was virtually the entire prosecution's case falsely testified that he had not been promised immunity, and this Court found that nondisclosure of information heavily bearing upon his credibility created a trial that was fundamentally un-

9. *Hitch* seems to be the fountainhead for those decisions in other states finding a similar duty to preserve evidence. They often cite it, and almost all were decided later. *E.g.*, *Lauderdale v. State* (Alaska 1976) 548 P.2d 376, 381-382 (Breathalyzer ampules); *Baca v. Smith* (Ariz. 1980) 604 P.2d 617, 618-620 (breath samples); *Garcia v. District Court*, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 929-930 (breath samples); *People v. Harnes* (Colo. App. 1980) 560 P.2d 470, 472-473 (video tape); *State v. Brown* (Ia. 1983) 337 N.W.2d 507, 509, 511 (blood sample); *State v. Lovato* (N.M.App. 1980) 617 P.2d 169, 171 (blood sample); *State v. Michener* (Or. App. 1976) 550 P.2d 449, 452-454 (Breathalyzer ampule); *City of Seattle v. Fetting* (Wash. 1974) 519 P.2d 1002, 1004-1005 (video tape). Like *Trombetta II*, *State v. Havas* (Nev. 1979) 601 P.2d 1197, 1197-1198, goes even further and requires an affirmative effort to collect possible evidence.

fair. In both cases this Court focused not upon the tangibility or nature of the evidence, but upon its character and the conduct of the prosecution. As this Court observed in *Mooney v. Holohan* (1935) 294 U.S. 103, 112:

“[D]ue process . . . embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. [Citation.] It is a requirement that cannot be deemed to be satisfied . . . if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury. . . .”

This Court has also counseled that:

“[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client’s overriding interest that ‘justice shall be done.’ He is the ‘servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.’” *United States v. Agurs* (1976) 427 U.S. 97, 110-111.

As this Court noted in *Agurs, id.* at 110, “If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.” Thus it would seem that the affirmative duty of disclosure which arises under *Brady* exists irrespective of the tangibility of the evidence.

That evidence destruction is not of itself a constitutional violation is apparent from this Court’s decision in *United States v. Augenblick* (1969) 393 U.S. 348, in which a tape recording of an interview with the defendant’s co-participant in indecent sexual acts, as well as notes of that interview, somehow were lost. The Court of Claims had found the loss or destruction of these materials to violate

due process. *Augenblick v. United States* (Ct. Cl. 1967) 377 F.2d 586, 606-607. Though this Court viewed at least the tape destruction a problem under the Jencks Act (18 U.S.C., § 3500), *id.*, at 354, it was not considered an issue of constitutional dimension. Speaking for a unanimous court, Justice Douglas observed (at 356):

"But questions of that character do not rise to a constitutional level. Indeed our *Jencks* decision and the Jencks Act were not cast in constitutional terms. [Citation.] They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials. . . . But certain it is that this case is not a worthy candidate for consideration at the constitutional level.

"The Court of Claims, in a conscientious effort to undo an injustice, elevated to a constitutional level what it deemed to be an infraction of the Jencks Act and made a denial of discovery which 'seriously impeded his right to a fair trial' a violation 'of the Due Process Clause of the Constitution.' 180 Ct. Cl., at 166, 377 F.2d, at 606-607. But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore v. Dempsey*, *supra* [(1923) 261 U.S. 86], that the proceeding is more a spectacle [citation] or trial by ordeal [citation] than a disciplined contest."

"There is no rule of law which requires the government to prove its case by 'real evidence.' " *Lebron v. United States* (1st Cir. 1957) 241 F.2d 885, 887, cert. den., 354 U.S. 911; accord, *Ware v. United States* (8th Cir. 1958) 259 F.2d 442, 444; *Brake v. State* (Mo. 1970) 460 S.W.2d 639, 641-642; *People v. Shafer* (1950) 101 Cal. App. 2d 54, 59-60, 224 P.2d 778, 781-782. Indeed, the majority of the evidence in any case is entirely testimonial.

Even in the most heinous of crimes—murder—physical proof of death is not required. *St. Clair v. United States* (1894) 154 U.S. 134, 152.¹⁰ The reports are replete with instances in which the evidence has been mistakenly discarded, negligently lost, routinely destroyed, or consumed in the process of analysis, without being considered offensive to due process.¹¹ Loss or destruction of evi-

10. This rule prevails even in California. *E.g.*, *People v. Manson* (1977) 71 Cal. App. 3d 1, 25, 139 Cal. Rptr. 275, 287, cert. den., 435 U.S. 953; *People v. Scott* (1959) 176 Cal. App. 2d 458, 489-496, 1 Cal. Rptr. 600, 619-623, cert. den., 364 U.S. 471, reh. den., 364 U.S. 944.

11. *United States v. Traylor* (9th Cir. 1981) 656 F.2d 1326, 1334-1335 (cocaine routinely destroyed); *United States v. Haddon* (5th Cir. 1976) 536 F.2d 1027, 1029-1030 (mash sample routinely destroyed); *D'Aquino v. United States* (9th Cir. 1951) 192 F.2d 338, 350, cert. den., 343 U.S. 935, reh. den., 343 U.S. 958 (tapes and Tokyo Rose scripts routinely destroyed); *Lee v. State* (Alaska 1973) 511 P.2d 1076, 1077 (heroin used up); *People v. Shafer* (1950) 101 Cal. App.2d 54, 59, 224 P.2d 778, 781 (heroin capsules crushed); *State v. Herrera* (Fla.App. 1979) 365 So.2d 399, 400-401 (heroin used up); *State v. Lightle* (Kan. 1972) 502 P.2d 834, 836 (drugs used up); *State v. Carlson* (Minn. 1978) 267 N.W.2d 170, 175 (bloodstain used up); *Gedicks v. State* (Wis. 1974) 214 N.W.2d 569, 572-573 (vapors evaporated); but see *Stipp v. State* (Fla. App. 1979) 371 So.2d 712, 713-714; *State v. Gaddis* (Tenn. 1975) 530 S.W.2d 64, 69.

Some courts, considering the issue more one of confrontation, have found no constitutional violation since the witness finding or testing the evidence is available for cross-examination. *E.g.*, *United States v. Sewar* (9th Cir. 1972) 468 F.2d 236, 238, cert. den., 410 U.S. 916 (blood sample discarded); *United States v. Brumley* (10th Cir. 1972) 466 F.2d 911, 916, cert. den., 412 U.S. 929 (paint particles used up); *State v. Cruz* (Ariz. App. 1979) 600 P.2d 1129, 1132 (drugs lost); *State v. Burns* (Conn. 1977) 377 A.2d 1082, 1085-1086 (clothing, hair samples lost); *State v. Armstrong* (Fla. App. 1978) 363 So.2d 38, 39 (loot returned); *People v. Ashton* (Ill. App. 1974) 309 N.E.2d 285, 286 (loot, weapon routinely destroyed). Others have not focused

dence goes to the weight of the evidence, not its admissibility. *United States v. Pullings* (7th Cir. 1963) 321 F.2d 287, 296; *Ware v. United States* (8th Cir. 1958) 259 F.2d 442, 444; *Gedicks v. State* (Wis. 1974) 214 N.W.2d 569, 572-573; see *St. Clair v. United States* (1894) 154 U.S. 134, 152-153. Ordinarily the loss or destruction of evidence is most "harmful" to the prosecution. See, e.g., *United States v. Loud Hawk* (9th Cir. 1979) 628 F.2d 1139, 1149, cert. den., 445 U.S. 917. It is at least an embarrassment to the prosecution when it has no evidence to exhibit. See, e.g., *Munich v. United States* (9th Cir. 1966) 363 F.2d 859, 861. It assuredly weakens the State's case. The defense may actually profit when a tested substance is missing, since it is able to "question the chemist who performed the test on the correctness and reliability of the procedures that were followed, and to challenge the veracity of the results . . . without being handicapped by the threat of further tests being performed so as to remove all doubt in the eyes of the jury." *United States v. Ortiz* (9th Cir. 1979) 603 F.2d 76, 80. But loss or destruction of evidence simply does not present a federal constitutional question. *United States v. Augenblick*, *supra*, 393 U.S., at 356; *United States v. Loud Hawk*, *supra*, at 1153-1154 (Kennedy, concurring).

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on a particular right, but have declined to hold that the constable or his expert erred. E.g., *United States v. Cochran* (5th Cir. 1983) 697 F.2d 600, 606 (inaudible tape erased); *United States v. Shafer* (7th Cir. 1971) 445 F.2d 579, 581-582 (fuses, powder routinely destroyed); *Munich v. United States* (9th Cir. 1966) 363 F.2d 859, 860, cert. den., 386 U.S. 974 (heroin routinely destroyed); *People v. Vick* (1970) 11 Cal. App. 3d 1058, 1066, 90 Cal. Rptr. 236, 241-242 (body buried); *Partain v. State* (Ga. 1978) 232 S.E.2d 46, 46-47 (cocaine used up); *State v. Sprout* (Mo. 1963) 365 S.W.2d 572, 575-576 (bloodstains lost).

Of even less constitutional concern, then, is evidence which the State never possessed in a form permitting practical retention. It is one thing to claim accountability for evidence taken into State custody and to forbid throwing it away, but it is an astounding proposition to extend responsibility to even those items the State never had. *People v. Miller, supra*, 52 Cal. App. 3d, at 669-670, 125 Cal. Rptr., at 343; *People v. Young* (Kan. 1980) 614 P.2d 441, 446. As noted in *Miller, supra*, "The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.'" As this Court has declared, "The law does not require impossibilities." *Pointer v. United States* (1894) 151 U.S. 396, 413.

Yet *Trombetta II* goes even beyond that fringe in requiring the State to take affirmative steps to gather evidence for the accused. As noted in *Miller*, 52 Cal. App. 3d, at 670, 125 Cal. Rptr., at 343, with an Intoxilyzer "The only element reducible to possession was the printout card, which has been preserved." In finding the facts below, Judge Antolini observed that "Without an addition to the present intoxilyzer unit . . . it would be impossible to exercise permanent control resulting in preservation of any sample." Requiring the State to develop some system for retaining a breath sample represents affirmative conduct for the sole benefit of the accused; a duty never before imposed upon the State. As the Kansas Supreme Court remarked in *State v. Young* (Kan. 1980) 614 P.2d 441, 446, in rejecting that proposition and cases advancing it:

"The basis for this requirement in this case is not well defined. These courts seem to be aware that

other courts do not require an extra sample. They hold in a general way, however, that it is incumbent upon the state to employ regular procedures to preserve evidence for the defendants. They require a state agent, in the regular performance of his duties, to reasonably foresee what evidence 'might be favorable to the accused' and to obtain and preserve the same for the defendant's use. [Citations.] The difficulty of accepting this logic in the present case is apparent. The item in question here is merely a sample of breath from the accused himself, which he alone can furnish for independent testing"

The difficulty in envisioning any limits upon such a duty disturbed the *Miller* court, which cautioned:

"The unwarranted extension . . . [of the duty] could have strange and unsettling results. If all evidence which can be made demonstrative *must* be so transformed, we shall encounter problems with extrajudicial declarations which, with fortuitous foresight, could have been tape-recorded, and eye-witness observations of events which could have been photographed."

The rule espoused by *Trombetta II* is without definable limits.

An even greater step beyond *Brady* was made when the Court of Appeal required the state to "preserve the captured evidence *or its equivalent* for the use of the defendant." 142 Cal. App. 3d at 144 (emphasis added). Of the devices approved in California, only the Intoxilyzer is non-destructive; the others physically consume the sample in the test process. See fn. 14, *infra*, at p. 22. This would mean that a completely different sample than even the police used would have to be taken for the defendant's testing. And in the case of the Intoxilyzer, even the retention devices used in Colorado, to which the *Trombetta*

If court referred, do not preserve the breath; they purport to capture the alcohol portion of the breath with an absorbant. In other words, there is no device whatsoever which would permit the defendant to retest—however unreliably—the same sample in the same form as that tested by the police.

There is no doubt that preservation of a substance chemically tested—such as a breath sample, were it possible—would be an ideal situation, but nonpreservation does not mean that the defendant has been denied a fair trial. *United States v. Traylor* (9th Cir. 1981) 656 F.2d 1326, 1335. Perfection is not constitutionally mandated. *Michigan v. Tucker* (1974) 417 U.S. 433, 446. As this Court observed in *McGautha v. California* (1971) 402 U.S. 183, 221:

“[T]he Federal Constitution . . . does not guarantee trial procedures that are the best of all possible worlds, or that accord with the most enlightened ideas . . . , or even those that measure up to the individual predilections of members of this Court. [Citation.] The Constitution requires no more than that trials be fairly conducted”

“When criminal evidence is lost or destroyed, the court’s principal concern is whether the defendant can have a fair trial even though he is not able to examine all the relevant evidence.” *United States v. Traylor, supra*, at 1334. Loss must seriously impair the defendant’s ability to present his defense. *United States v. Loud Hawk* (9th Cir. 1979) 628 F.2d 1139, 1153, fn. 3 (Kennedy, concurring). The evidence must be so material that the defendant cannot get a fair trial without it. *United States v. Wilks* (10th Cir. 1980) 629 F.2d 669, 674. Yet as Judge Kennedy noted in *United States v. Loud Hawk, supra*, at 1154: “Rarely

will the unfairness that might be caused by the destruction of evidence rise to the level of making the proceedings 'a spectacle or trial by ordeal.'” Yet that is the standard for finding a due process violation. *United States v. Augenblick* (1969) 393 U.S. 348, 356.

Many courts have held that the ability on cross-examination to probe into the accuracy of test results, the competence of the expert, the acceptability of the methodology, and the adequacy of the equipment are sufficient to satisfy constitutional concerns even though the evidence itself is missing or destroyed.¹² As the California Court of Appeal noted in *People v. Miller, supra*, 52 Cal. App. 3d, at 669, 125 Cal. Rptr., at 343:

“The only element reducible to possession was the [Intoxilyzer] printout card, which has been preserved. The machine itself remains available. It and the frequent testings required by regulations of the Department of Health are available for discovery and impeachment.”

Nothing more is constitutionally required.

Nor is there something *sui generis* about breath testing in drunk driving cases which creates an exception to the rule. As a matter of fact, a defendant charged with drunken driving is uniquely prepared to counter the State's chemical evidence, for it is he who is in possession of the sample source. As the Kansas Supreme Court observed in *State v. Young* (Kan. 1980) 614 P.2d 441, 446:

12. *United States v. Traylor* (9th Cir. 1981) 656 F.2d 1326, 1335; *United States v. Ortiz* (9th Cir. 1979) 603 F.2d 76, 80; *United States v. Sewar* (9th Cir. 1972) 468 F.2d 236, 238; *United States v. Brumley* (10th Cir. 1972) 466 F.2d 911, 916; *State v. Cruz* (Ariz. App. 1979) 600 P.2d 1129, 1132; *People v. Vick* (1970) 11 Cal. App. 3d 1058, 1066, 90 Cal. Rptr. 236, 241-242; *State v. Burns* (Conn. 1977) 377 A.2d 1082, 1085-1086; see *State v. Cloutier* (Me. 1973) 302 A.2d 84, 89.

"The item in question here is merely a sample of breath from the accused himself, which he alone can furnish for independant testing by his own physician as authorized by . . . [statute]." Like Kansas, California law specifically provides that a drunk-driving suspect has an absolute right to have his own sample collected and tested by his own expert. Cal. Veh. Code, § 13354(b). Police officers are forbidden from interfering with that right. See *People v. Superior Court (Scott)* (1980) 112 Cal. App. 3d 602, 605, 169 Cal. Rptr. 412, 413.¹³ Due process does not require more. *State v. Young, supra*; *State v. Cornelius* (N.H. 1982) 452 A.2d 464, 465.

In *Trombetta II*, the California Court of Appeal held that due process was satisfied only if the prosecution used a device which preserved something for retesting for the defendant. See 142 Cal. App. 3d, at 142, 144, 190 Cal. Rptr., at 321-323. This very contention was previously rejected in *People v. Miller, supra*, 52 Cal. App. 3d, at 670, 125 Cal. Rptr., at 343, with this commentary and observation:

13. If officers improperly prevent the defendant from obtaining his own sample in a timely manner, then evidence of the alcohol test taken by or for the police will be suppressed. *Brown v. Municipal Court* (1978) 86 Cal. App. 3d 357, 363-365, 150 Cal. Rptr. 216, 220-222. Since alcohol is quickly excreted from the body, the same principle requiring a prompt test or sample collection for law enforcement purposes applies to a sample or test for defense purposes. *Id.*, 86 Cal. App. 3d, at 362, 150 Cal. Rptr., at 220. Once testing for law enforcement is completed, if the defendant has requested his own test by his own expert, he must at least be given an opportunity to make arrangements for it, such as a phone call. *In re Martin* (1962) 58 Cal. 2d 509, 511-512, 24 Cal. Rptr. 833, 834; *In re Koehne* (1960) 54 Cal. 2d 757, 760, 8 Cal. Rptr. 435-436; *McCormick v. Municipal Court* (1961) 195 Cal. App. 2d 819, 821-824, 16 Cal. Rptr. 211, 215. If facilities for sample collection

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"We find it no answer to say . . . that another device . . . could have been used and that, for some undetermined time, it would have preserved a sample chemical subject to reasonably accurate testing. . . .

"The unwarranted extension of *Hitch* could have strange and unsettling results. If all evidence which can be made demonstrative *must* be so transformed, we shall encounter problems with extrajudicial declarations which, with fortuitous foresight could have been tape-recorded, and eyewitness observations of events which could have been photographed."

What the "collection and preservation" requirement really does it to completely reject fundamental concepts which underlie both our governmental agencies and our judicial system. It is otherwise presumed that governmental officials will faithfully perform their duties. *E.g.*, *Kephart v. Richardson* (3d Cir. 1974) 505 F.2d 1085, 1090; Cal. Evid. Code, § 664. The preservation requirement assumes that they will not. California breath test instruments are rigorously tested, periodically checked, and their use strictly regulated. *People v. Miller, supra*. The preserva-

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are readily available locally, then officers must take the defendant to them once he has made those arrangements. See *In re Howard* (1962) 208 Cal. App. 2d 709, 711, 716, 25 Cal. Rptr. 590, 591, 594. If the defendant is already someplace like a hospital where he can have his own sample taken, then the officer cannot interfere with his request to have his own sample. *Brown v. Municipal Court, supra*, 86 Cal. App. 3d, at 360, 362, 365, 150 Cal. Rptr., at 219, 220, 222.

Current California law gives the accused even greater protection. Vehicle Code, section 13353.5, requires any suspect who has elected to take a breath test to be advised that no sample will be retained for possible retesting, so that if he wants a sample for retest, he must give a sample of blood or urine. The section also requires the sample to be collected for him by the testing agency. *Id.* This statute was enacted in response to *Trombetta II*.

tion requirement assumes that the instruments will fail, or the strictures be ignored. Years ago in *St. Clair v. United States* (1894) 154 U.S. 134, 152, this Court relied upon a decision by Justice Story holding that a murder at sea could be proved though the body was never found. In *United States v. Gilbert* (No. 15,204) 25 Fed. Cas. 1287, 1290-1291, Justice Story commented thusly:

"[I]t is probable, that in some few instances, though they have been rare, innocent persons have been convicted, upon circumstantial evidence, of offences, which they never committed. The same thing has probably sometimes, though perhaps not more rarely, occurred, where the proofs have been positive and direct from witnesses, who have deliberately sworn falsely to the facts, constituting the guilt of the accused. But to what just conclusion does this tend? Admitting the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare, that no human testimony to circumstances or to facts, is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administration of public justice."

And that is precisely what the preservation requirement does.

II.

There Has Been No Violation Of Any Brady Standard.

No matter what is required in the way of evidence preservation, *Brady* has not been violated here. In *Moore v. Illinois* (1972) 408 U.S. 783, 794-795, this Court explained that:

"The heart of the holding in *Brady* is the prosecution's suppression of evidence in the face of a de-

fense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, *and* (c) the materiality of the evidence." (*Italics added.*)

These factors have been conjunctively joined by this Court. Yet not one of them is satisfied here.

The Intoxilyzer automatically pumps the sample analyzed out so that the instrument can be recycled for another test; that is how the manufacturer designed it. Thus the breath sample is "destroyed" in the analytical process.¹⁴ Up until now, it has been held that a test procedure which by its nature destroys the material tested is not the equivalent of suppression. *United States v. Love* (5th Cir. 1973) 482 F.2d 213, 220 (gunshot residue used up); *State v. Atkins* (Fla. App. 1979) 369 So. 2d 389, 390 (heroin used up); see also cases cited in fn. 11, *supra*, at pp. 13-14; but see *Stipp v. State* (Fla. App. 1979) 371 So. 2d 712, 713-714.¹⁵ Nor is it considered "suppression"

14. All breath testing instruments approved in California destroy the sample by one means or another. The Intoxilyzer discharges its sample into room atmosphere. In the Breathalyzer, the sample is chemically consumed as it bubbles through a solution of potassium dichromate and sulphuric acid. In the gas chromatograph devices, the breath is separated into various components and swept out into room atmosphere along with a carrier gas. One model—the one which can analyze an indium-tube sample—also burns the sample tested in the process.

15. Some cases, including *Stipp*, require the prosecution to give notice to the defense before engaging in destructive testing of small samples. *State v. Gaddis* (Tenn. 1975) 530 S.W.2d 64, 69; see *State v. Carlson* (Minn. 1978) 267 N.W.2d 170, 175, fn. 4. California Vehicle Code, § 13353.5, accomplishes much the same thing.

where the destruction flows from a routine practice. *D'Aquino v. United States* (9th Cir. 1951) 192 F.2d 338, 350; see *United States v. Augello* (2nd Cir. 1971) 451 F.2d 1167, 1170. If the defendant "requests" his own sample, California law assures that right. Cal. Veh. Code, § 13354(b); see fn. 13, *supra*, at pp. 19-20. Hence the first of the *Moore* tests is not satisfied.

The second requirement is that the evidence be favorable to the accused. Of course the converse is true here; an evidential breath test with a BAC exceeding .10 is clearly incriminating. *Brady* does not concern itself with incriminating evidence. *United States v. American Radiator & Standard Sanitary Corp.* (3d Cir. 1970) 433 F.2d 174, 202, cert. den., 401 U.S. 948. In this regard, both *People v. Hitch* (1974) 12 Cal. 3d 641, and *United States v. Bryant* (D.C. Cir. 1971) 439 F.2d 642, seem to turn this requirement on its head. *Hitch* requires preservation if it is "reasonably possible" that the item might give favorable evidence on the question of guilt or innocence. *Id.*, 12 Cal. 3d, at 648-649, 527 P.2d, at 366-367. As noted in *Edwards v. Oklahoma* (D. Okla. 1976) 429 F. Supp. 668, 671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978):

"This extension of the *Brady* doctrine is not justified as a matter of constitutional law. *Brady* focused upon the harm to the defendant resulting from non-disclosure. *Hitch* diverts this concern from the reality of prejudice to speculation about contingent benefits to the defendant. Without regard to . . . the specific prejudice to the accused the rule would render constitutionally infirm every conviction in which there are missing items of evidence or evidence which may

have been destroyed or damaged by careless or inept investigators.¹⁶

Edwards is consistent with this Court's remarks in *United States v. Agurs* (1976) 427 U.S. 97, 109-110, that "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

Federal courts have never found a *Brady* violation where the evidence destroyed or undisclosed would not tend to exculpate the defendant or had no real evidentiary value. See *Norris v. Slayton* (4th Cir. 1976) 540 F.2d 1241, 1243-1244; *Fields v. Alaska* (9th Cir. 1975) 524 F.2d 259, 260-261; *United States v. Brumley* (10th Cir. 1972) 466 F.2d 911, 916; *Bergenthal v. Cady* (7th Cir. 1972) 466 F.2d 635, 637, cert. den., 409 U.S. 1109; *Riley v. Sigler* (8th Cir. 1971) 437 F.2d 258, 259-260. *Brady* does not require preservation of "any evidence which might conceivably aid the defense in the preparation of its case." *Williams v. Wolf* (8th Cir. 1973) 473 F.2d 1049, 1054; see *Killian v. United States* (1961) 368 U.S. 231, 242. A defendant cannot merely assert that the missing evidence would be favorable; he must demonstrate how, colorably establish his claim, or show that the secondary evidence available is not sufficient for a fair trial. *United States v. Balliviero* (5th Cir. 1983) 708 F.2d 934, 943; *United States v. Griffin* (9th Cir. 1982) 659 F.2d 932, 939; *United States v. Loud Hawk* (9th Cir. 1979) 628 F.2d 1139, 1156 (Kennedy, concurring); *D'Aquino v. United States* (9th Cir. 1951) 192 F.2d 338, 350; *State v. Shaw* (Conn. 1981) 441 A.2d 561, 568. Specu-

16. Such attacks on convictions have indeed become old hat in California. See, e.g., *People v. Harris* (1976) 62 Cal. App. 3d 859, 862-865, 133 Cal. Rptr. 352, 353-355.

lation doesn't count. *United States v. American Radiator & Standard Sanitary Corp.* (3d Cir. 1970) 433 F.2d 174, 202.¹⁷

In *United States v. Bryant* (D.C. Cir. 1971) 439 F.2d 642, 647-648, the court established essentially a presumption of favorability where the evidence itself was lost. But the very same factors which so concerned the court in *Bryant* also concerned the court in *Augenblick v. United States* (Ct. Cl. 1967) 377 F.2d 586, 605-606, which this Court reversed for elevating a statutory infraction to a constitutional right, 393 U.S. 348, 356. Such an assumption reflects a basic distrust of public officers which should not be indulged by the courts. See *United States v. Hoppe* (8th Cir. 1981) 645 F.2d 630, 634, cert. den., 454 U.S. 849; *United States v. Sewar* (9th Cir. 1972) 468 F.2d 236, 238; cf. *United States v. Gilbert* (No. 15,204) 25 Fed. Cas. 1287,

17. The *Hitch* court should have heeded such advice. *Hitch* guessed wrong. The vast majority of courts reject the decision because it is simply wrong on the facts—it is not possible to reliably retest Breathalyzer ampules. See *State v. Phillipe* (Fla. App. 1981) 402 So.2d 33, 34; *People v. Stark* (Mich. App. 1977) 251 N.W.2d 574, 575-577; *State v. Teare* (N.J. Super. 1975) 342 A.2d 556, 668, and *State v. Bryan* (N.J. Super. 1974) 336 A.2d 511, 513; *People v. LePree* (Rochester City Ct. 1980) 430 N.Y.S.2d 778, 781-782; *State v. Larson* (N.D. 1981) 313 N.W.2d 750, 755-756; *State v. Shutt* (N.H. 1976) 363 A.2d 406, 407; *State v. Watson* (Ohio App. 1975) 355 N.E.2d 883, 884-885; *Edwards v. State* (Okla.Crim.App. 1976) 544 P.2d 60, 62-64; *Edwards v. Oklahoma* (D. Okla. 1976) 429 F.Supp. 668, 670-671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978); *State v. Newton* (S.C. 1980) 262 S.E.2d 906, 909; *State v. Helmer* (S.D. 1979) 278 N.W.2d 808, 810-811; *Turpin v. State* (Tex.Crim.App. 1980) 606 S.W.2d 907, 916-917; *State v. Canady* (Wash. 1978) 585 P.2d 1185, 1187-1188. The National Safety Council Committee on Alcohol and Drugs has also specifically rejected *Hitch*. See 22 J. Forensic Science 486 (1977). One judge finally put a defense alchemist to the test, providing empirical evidence that retests were 100% inaccurate and always to the defendant's disadvantage. See *People v. Santiago* (Sup. Ct. N.Y. Co.) 455 N.Y.S.2d 511, 515-517.

1290-1291 (C.C. Mass. 1834). It is even less warranted in a case such as this where the instrument is tested, periodically checked, regulated, and available for re-examination.

The third *Brady* factor is that of materiality. But we believe that "materiality" is to be addressed in due process terms; not as the *Hitch* case (12 Cal. 3d, at 647, 527 P.2d, at 365-366) or *Trombetta II* did (142 Cal. App. 3d, at 143, 190 Cal. Rptr., at 322) merely by looking to see whether it was significant evidence in the case. The real question is whether or not the defendant has been deprived of a fair trial. *United States v. Augenblick* (1969) 393 U.S. 348, 356. As we demonstrated in Argument I, *supra*, a fair trial may be had by means other than examination of physical evidence which has been lost or destroyed.

Furthermore, we do not believe that a retained breath sample would be "material" in any real sense. Were the sample retested and found to confirm the prosecution results, then only the prosecution benefits. Cf. *United States v. Ortiz* (9th Cir. 1979) 603 F.2d 76, 80. But what if there is a discrepancy? It means that either the prosecution's instrument was erroneous or the defense analysis was in error. And how can the conflict be resolved? By going back to the test instrument; by examining its logs and by running test samples on it. Yet as *People v. Miller* noted, all this can be done without a "preserved sample" in the first place. 52 Cal. App. 3d, at 670, 125 Cal. Rptr., at 343.

Nor could a preserved breath sample be "material" under *Brady* unless it were proven that a practical means of preservation exists which permits a reliable retest. As the Florida Court of Appeal noted in *State v. Lee* (Fla. App. 1982) 422 So. 2d 76, 78:

"Although some courts have held that failure by the state to automatically preserve a breath sample is tantamount to suppression of evidence, those holdings have come where the defendant has shown that the preservation was scientifically possible. . . . We have found no case which has considered the defendant's due process contention concerning the state's failure to produce a breath sample without evidence and findings at the trial level that it was scientifically possible for the state to collect and preserve such a sample."

Accord, *People v. Reed* (Ill.App. 1981) 416 N.E.2d 694, 697. The trial court below did not make such a finding. The California Court of Appeal refused to address the issue.

The Court of Appeal placed great reliance on *Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924 928-929, in which there was evidence that samples could be preserved. But in view of the subsequent field experience with the "Colorado method" outlined in *Montoya v. Metropolitan Court* (N.M. 1982) 651 P.2d 1260, 1261, in which the head of Colorado's Department of Health testified that the retests were erroneous 80-90 percent of the time, it can hardly be contended that a "preserved" breath sample yields material evidence for the accused. Not only are there no breath analysis instruments approved for use in California which themselves capture and preserve a breath sample, but there are no capturing devices approved to attach to them. As a matter of fact, the scientific body which the California Legislature established to advise the Department of Health on matters of this sort (Cal. Health & Saf. Code, § 436.50) has recently concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample. Advisory Committee on Alcohol Determination, Department

of Health, Notes of Meeting of August 31, 1982, p. 29. This unreliability has prompted a number of state courts to reject retention requirements. See *State v. Phillipe* (Fla.App. 1981) 402 S.3d 33, 34; *State v. Larson* (N.D. 1981) 313 N.W.2d 750, 755-756; *id.*; *State v. Newton* (S.C. 1980) 262 S.E.2d 906, 909, fn. 1. Furthermore, a discrepancy between instrument test results and a preserved sample would not in itself exonerate, but would simply force a retest of the machine to determine which result was accurate. Hence a retained sample is of no real value; the instrument can always be retested whether or not a sample is preserved. As we have already noted, *supra*, at p. 24, federal courts have never found a *Brady* violation where the destroyed evidence would not tend to exculpate the defendant or had no real evidentiary value.

CONCLUSION

Trombetta II contorts *Brady* into something never intended by this Court. If left standing, it will not only significantly disrupt the ability of California and other States to enforce their drunk driving laws, but will impact upon every other criminal prosecution, making "the State the guarantor of a perfect investigation and the absolute insurer of all evidence," *Edwards v. Oklahoma* (D. Okla. 1976) 429 F. Supp. 668, 671, as well as an investigator and evidence collector for the defense. Though this may be "the best of all possible worlds" for criminal defendants, it is not one created by our federal concept of due process of law.

We submit that these cases must be reversed.

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